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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1062

ROBERT DURAM, ET UX.,

Appellants,

vs.

INDEPENDENCE HOMES, INC., AN ILLINOIS CORPORATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION PURSUANT TO RULE 16(b) TO DISMISS APPEAL.

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Appellee moves pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States to dismiss the appeal from the Supreme Court of Illinois in this cause on the ground that the federal question sought to be reviewed was not passed on by the Supreme Court of Illinois and because no substantial federal question is presented.

The Supreme Court of Illinois Did Not Rule on the Constitutionality of the Bond Requirements of the Forcible Act.

Appellants refer to the order entered by Justice Thomas E. Kluczynski on October 18, 1969 as the "Opinion of the Supreme Court of Illinois" (Appendix A of the Jurisdic-

tional Statement). However, this was merely an order of one Justice of that Court and the order was prepared and tendered by appellants' counsel with the request that their appeal be dismissed because their motion to approve an appeal bond had been denied. The requested appeal bond specified that monthly deposits would be made with the Clerk of Court in the amounts which would have been due to be paid appellee by the terms of the installment contract for purchase of real estate under which contract appellants had been purchasing from appellee a newly constructed home. Justice Kluczynski did offer to approve an appeal bond which provided that such monthly payments would be made directly to appellee during the pendency of the appeal. This form of bond would have enabled appellee to make its monthly payments to the mortgagee on the premises. Justice Kluczynski's proposal involved no more financial outlay for appellants than the procedure which they requested to be approved. Nevertheless, the offer was rejected and the Justice was requested to dismiss the appeal. Acceptance of the offered form of appeal bond would have been contrary to the purpose of the payment strike being engaged in by appellants and other members of the Contract Buyers League as a means of economically coercing appellee to renegotiate the purchase price of the homes being purchased from it or face financial ruin through mortgage foreclosures. The payment strike was being pursued although appellants and other members of the League have a pending suit in the Federal District Court for the Northern District of Illinois wherein they claim a right to reformation of the contracts entered into with appellee and its related companies.

But it is clear from the order signed by Justice Kluczynski that he did not rule on the contention which appellants claim was made that unless their appeal bond was approved the bond requirements of the Illinois Forcible Entry and

Detainer Act, Chapter 57 Illinois Revised Statutes, would operate to deprive them of their rights under the Constitutions of the United States and the State of Illinois. The order contains nothing from which it may be even inferred that Justice Kluczynski ruled that the bond requirement was or was not a constitutional enactment. All that the order recites is that an argument was had on the issue, but the order contains no ruling on the matter.* In any event Justice Kluczynski could not rule on the constitutionality of the bond requirements of the Illinois Forcible Entry and Detainer Act unless he had the concurrence of three other Justices. This is clear from Article VI Section 4 of the Illinois Constitution which provides:

> "The Supreme Court shall consist of seven judges, three of whom shall be elected from the first judicial district and one each from the second, third, fourth and fifth judicial districts. Four judges shall constitute a quorum and the concurrence of four judges shall be necessary to a decision."

Aside from the fact that no decision of the Supreme Court of Illinois may be rendered by a single Justice, that Court would not have ruled on the constitutionality of the bond requirements of the Forcible Entry and Detainer Act in this case because the Supreme Court of Illinois is without original jurisdiction in a case of this type and no claim was made in the trial court that the bond requirements of the Act were unconstitutional, which would permit the matter to have been determined by the Supreme Court of Illinois under its appellate jurisdiction. Article VI Section 5 of the Illinois Constitution provides with regard to the jurisdiction of the Supreme Court of the State in part as follows:

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* The order of October 29, 1969 (Appendix G of the Jurisdictional Statement) is silent regarding any claimed constitutional issue.

"The Supreme Court may exercise original jurisdiction in cases relating to the revenue, mandamus, prohibition and habeas corpus, such original jurisdiction as may be necessary to the complete determination of any cause on review and only appellate jurisdiction in all other cases."

Failure to raise the constitutional issues in the trial court precluded their being raised in the Supreme Court of Illinois by appellants, assuming they had decided to accept Justice Kluczynski's offered appeal bond procedure. *Shilvock* v. *Retirement Board of Policemen's Annuity and Benefit Fund of Chicago*, 375 Ill. 68; *Lithuanian Alliance of America* v. *Home Bank and Trust Co.*, 362 Ill. 439 and *Forman-State National Bank* v. *Sistek*, 358 Ill. 525.

Appellee submits no ruling was made by the Supreme Court of Illinois and that none could have been made with regard to the constitutionality of the bond requirements of the Illinois Forcible Entry and Detainer Act. The reality of the situation is that Justice Kluczynski offered appellants a procedure whereby monthly payments could be made during the pendency of the appeal to appellee and appellants would not have to post a cash appeal bond. Under these circumstances neither the single Justice of the Supreme Court of Illinois nor the full Court had occasion to even consider whether the bond requirements of the statute were or were not constitutional.

All of the foregoing is made abundantly clear by reason of the fact that on February 3, 1970 the Supreme Court of Illinois pursuant to motion of counsel representing members of the Contract Buyers League, including the attorneys for appellants in this cause, transferred other cases in which appellee and its related companies were plaintiffs-appellees in the Illinois Appellate Court to the Supreme Court for the purpose of making an initial decision on the constitutionality of the bond requirements of the Forcible

Entry and Detainer Act. It was represented to the Supreme Court by one of counsel for appellants that the Court had never ruled on the issue.

There Is No Substantial Federal Question.

Assuming arguendo that the Supreme Court of Illinois had ruled adversely to appellants' claim that the bond provisions of the Forcible Entry and Detainer Act were unconstitutional, that ruling would not present a substantial federal question.

Section 20 of the Illinois Forcible Entry and Detainer Act provides that the condition of a bond which shall be posted by a defendant who appeals a judgment for possession shall be that the defendant will (1) prosecute such appeal with effect (2) regardless of the outcome of such appeal, pay all rent then due or that may become due before the final determination of the suit and (3) in case the judgment is affirmed or appeal dismissed pay all damages or loss which plaintiff may sustain by reason of the withholding of the premises and by reason of any injury done thereto during such withholding. Clearly these are conditions intended to protect the party who successfully demonstrates a right of possession of the premises from financial loss while the unsuccessful litigant continues to occupy and use the premises during the pendency of the appeal. If the legislature had not imposed such conditions an unsuccessful defendant would continue to occupy the premises during the period of the appeal, which is on average eighteen months in civil cases in the First District Appellate Division, without ever answering to the party entitled to possession of those premises for the rent or contract payments which would otherwise have been paid for such possession. Such a result would be financially

ruinous to the owner of the premises, because the owner would be unable to meet mortgage obligations during said period or pay real estate taxes assessed against the property. Consequently, the owner's property would be taken and used without any protection for the owner with regard to such use and occupancy, or loss of the owner's equity in the event of mortgage foreclosure or such loss in the event the property was sold for taxes. In addition the owner would be deprived of any basis for being compensated for any injury or damage done to the property.

In the instant case appellee entered into a contract with appellants on July 17, 1960 to sell appellants a newly constructed home under an installment contract for a purchase price of $21,450.00. Appellants paid $2,000.00 down and thereafter made monthly payments to appellee for principal, interest, taxes and insurance. The contract provides for an interest rate of 6½% on the balance from time to time remaining due and appellee's mortgage on the premises provides for an identical rate of interest.

On July 1, 1969 the appellants, in concert with other members of the Contract Buyer's League, commenced a payment strike against appellee and its related companies. As of that date the unpaid principal on the appellants' contract with appellee was $15,351.98, appellants having paid $6,098.12, including their $2,000.00 down payment, on the principal obligation under the agreement. Appellants' jurisdictional statement claims they had paid $15,000.00 on the contract, but appellants do not point out that this sum included interest, taxes and insurance. Appellants have made no payment on their agreement with appellee since July 1, 1969. Meanwhile appellee's monthly mortgage obligation, which is only $14.75 less per month than the amount to be paid on the contract by appellants, has not

been paid. By reason of appellants' payment strike no deposits for payment of real estate taxes have been made during the seven month period. This has all occurred, not because appellants are unable to make their monthly payments to appellee, but by reason of a willful refusal to do so. Obviously this case does not involve persons who can be classified as indigents and the affidavit of appellants in support of their motion for leave to file ten copies of a typewritten jurisdictional statement makes it clear that they are not indigents. They describe themselves as "poor" and on the basis of this description contend that the bond requirements of the Forcible Act of Illinois violate the equal protection and due process guarantees of the Fourteenth Amendment because they deny a "poor" person a right to appeal. The cases cited by appellants in their jurisdictional statement as support for this contention all pertain to situations wherein the *State* imposed a financial obligation as a condition precedent to a hearing on a habeas corpus petition, to an appeal by an indigent prisoner or to a right to vote in State elections. None of the cases cited can be considered as any support for the argument that a private citizen should be denied execution on a judgment, in this case a judgment for possession of the citizen's property, because the defendant wishes to appeal that judgment without posting a supersedeas bond to protect the judgment creditor's property rights while the defendant continues to use and enjoy said property. If such a result were possible, then a judgment creditor would be denied the right of equal protection of the law on the mere assertion by the judgment debtor that he was "poor." Such a result would encourage spurious appeals in every action and particularly in those involving a right of possession of property where the defaulting contract buyer or

tenant would be literally invited to remain in the property without compensation to the owner for its use and occupancy during the pendency of the appeal.

Respectfully submitted,

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PER CURIAM

SUPREME COURT OF THE UNITED STATES

October Term, 1969

DURHAM ET UX. *v.* INDEPENDENCE HOMES, INC.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 1062. Decided February 27, 1970

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.